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No. 08-1447

In the Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, ET AL.,
PETITIONERS

v.

RANDY BABBITT, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The City of Chicago is in the midst of a multi-year, multi-billion-dollar program to modernize O'Hare International Airport. The Federal Aviation Administration (FAA) has authorized the City of Chicago to collect passenger facility charges (PFCs) in order to partially finance the modernization.

Petitioners are a church and two of its members. They object to the modernization project because it will require relocation of a cemetery to accommodate a runway. They contend that the FAA's approval of the collection of certain PFCs violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb-1(b).

The question presented is whether the court of appeals erred in concluding that petitioners lack standing to challenge the FAA's approval of certain PFCs under RFRA.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 550 F.3d 1168.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. A petition for rehearing was denied on February 19, 2009 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on May 19, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause of the First Amendment does not require neutral laws of general applicability to be justified by a compelling government interest, even if they substantially burden a religious practice. *Id.* at 882-890. In response, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which provides:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000bb-1(b).

Although this Court invalidated RFRA as applied to the States and their subdivisions in *City of Boerne* v. *Flores*, 521 U.S. 507, 532-536 (1997), RFRA continues to apply to the federal government, see 42 U.S.C. 2000bb-3(a).

2. This case concerns a challenge to one part of a multi-year, multi-billion-dollar program the City of Chicago has undertaken to modernize O'Hare International Airport (O'Hare). Pet. App. 1a; Pet. 2-3 & n.1. Petitioners are a church that owns a cemetery that will be relocated because of the modernization project and two individual church members who have deceased family members in the cemetery. Pet. App. 2a; Pet. 8-9. Petitioners have long objected to the modernization program and have challenged various aspects of it in court. In this case, petitioners challenge one particular administrative

ruling, which is the Federal Aviation Administration's (FAA's) authorization of the City of Chicago to collect passenger facility charges (PFCs) to fund part of the modernization plan. In petitioners' view, the FAA's decision violates RFRA.

a. O'Hare, which is "by some measures the busiest airport in the world," "has been plagued by delays in recent years." Pet. App. 15a-16a (internal quotation marks omitted). Those delays "spark further delays around the country and the world, with serious economic and logistical consequences." *St. John's United Church of Christ* v. *City of Chi.*, 502 F.3d 616, 634 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008). Moreover, "[a]ir traffic at O'Hare is projected to increase in the future from some 31 million passengers and 922,787 operations in 2002 to some 50 million passengers and 1,194,000 operations by 2018." *Id.* at 634-635 (brackets in original).

In 2001, the City of Chicago announced that it would undertake a multi-year modernization project designed to reduce delays and increase capacity at O'Hare. *St. John's*, 502 F.3d at 620. The project involves reconfiguring several runways into a more effective runway architecture that would "permit a constant stream of take-offs and landings." *Ibid.* The City of Chicago determined that the runway reconfiguration would require it to acquire 433 acres of nearby land, including St. Johannes Cemetery, which is owned by petitioner St. John's United Church of Christ. *Id.* at 620-621. The City plans to relocate the cemetery. *Id.* at 621.

b. In December 2002, the City of Chicago submitted an airport layout plan detailing the proposed modernization to the FAA for review. Pet. App. 19a; see 49 U.S.C. 47107(a)(16) (requiring airport owner to obtain approval

of any revision to its airport layout plan before that revision takes effect). In September 2005, the FAA issued a 492-page Record of Decision (ROD) approving the City's airport layout plan. Pet. App. 21a. In the ROD, the FAA reviewed the plan and compared the plan to a variety of alternatives. *Id.* at 19a. After narrowing its consideration to four plausible alternatives, the FAA performed a number of computer simulations to determine "how well each alternative would enhance capacity and reduce delays." *Ibid.* The FAA concluded that the City's plan would result in the shortest average delay and $150 million in savings in the five years following construction, making the plan "clearly preferable to all others." *Id.* at 19a-20a.

Petitioners had informed the FAA that they believed that the City's plan to relocate the cemetery substantially burdened their religious exercise in violation of RFRA. Pet. App. 20a. Although the FAA "express[ed] uncertainty over whether it was required to comply with RFRA * * * because the City"—and not a federal agency—"was ultimately responsible for designing and implementing the expansion plan," it decided, in an abundance of caution, to analyze the City's plan as if RFRA did apply. *Ibid.* The FAA determined that, even if relocation of the cemetery would substantially burden petitioners' religious practices, no less restrictive alternative could further the compelling governmental interests in reducing delay and enhancing capacity at O'Hare. ROD 92-95, 97-103.[1]

A few months after issuing the ROD, the FAA issued a non-binding letter of intent to provide the City with

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[1] The ROD is available at <http://ohare.com/rod/ORD_ROD_Final.pdf>.

approximately $337 million in federal funds over fifteen years for the modernization project. Pet. App. 21a.

3. Petitioners filed petitions for review of the ROD and the letter of intent in the D.C. Circuit.

The court of appeals denied the petitions for review. Pet. App. 15a-61a. The court first rejected petitioners' argument that the FAA's approval of the airport layout plan violated RFRA. *Id.* at 21a-40a. The court explained that, because the FAA is subject to RFRA but the City of Chicago is not, petitioners were required to demonstrate that any burden on their religious exercise caused by the modernization project was attributable to the FAA, rather than to the City. *Id.* at 24a-27a. The court explained that "[m]ere approval of or acquiescence in" the City's plan would not be sufficient to demonstrate that the FAA was the source of any burden on religious exercise. *Id.* at 31a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)). And the court observed that "receipt of public funds, even of 'virtually all' of an entity's funding, is not sufficient to fairly attribute the entity's actions to the government." *Ibid.* (quoting *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840-841 (1982)).

The court concluded that "the FAA's peripheral role in the City's relocation of [the cemetery] is not sufficient to hold the agency responsible for purposes of RFRA," because the FAA merely approved the plan; it did not design the plan and cannot compel the City to implement some or all of the plan. Pet. App. 32a-33a. Moreover, the court noted, "[t]he City will provide the lion's share of the funding for the modernization project" and "intends to provide all of the funding through other sources if the federal funds are not forthcoming." *Id.* at 33a. The court also expressed concern that holding the FAA responsible for a project designed and implement-

ed by the City would permit an end-run around this Court's decision in *City of Boerne*, which made clear that the RFRA does not apply to States and their subdivisions, 521 U.S. at 532-536. See Pet. App. 39a-40a.

The court of appeals also rejected petitioners' challenges to the FAA's letter of intent. Pet. App. 40a-45a. The court explained that the letter was not a final agency order subject to judicial review; it was merely "a planning document" that "has no effect absent two conditions precedent: FAA approval of a further grant application by the City and congressional appropriation of funds." *Id.* at 41a-43a. In any event, the court determined, petitioners did not have standing to challenge the FAA's issuance of the letter of intent because invalidating that decision would not redress petitioners' claimed injury. *Id.* at 43a-45a. The court explained that the letter of intent concerned only a small fraction of the funds required for the modernization project, and the City had demonstrated that if those funds were not available from the FAA, the City would proceed with alternate sources of funding, such as revenue bonds. *Id.* at 44a-45a.

Finally, the court of appeals rejected petitioners' various procedural challenges to the ROD. Pet. App. 45a-51a.

Petitioners did not seek this Court's review of the court of appeals' decision.

4. In the meantime, petitioners sued the City of Chicago, the State of Illinois, various state and local officials, and the FAA in federal district court to block the modernization project. The district court dismissed the complaint. See *St. John's United Church of Christ* v. *City of Chi.*, 401 F. Supp. 2d 887 (N.D. Ill. 2005), aff'd, 502 F.3d 616 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008).

The court of appeals affirmed. See *St. John's United Church of Christ* v. *City of Chi.*, 502 F.3d 616 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008). As relevant here, the court of appeals rejected petitioners' claims that the City, State, and various city and state officials violated the First Amendment, the Equal Protection Clause, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, and the Illinois Religious Freedom Restoration Act (IRFRA), 775 Ill. Comp. Stat. Ann. 35/1 *et seq.* (West 2000 & Supp. 2009). See *St. John's*, 502 F.3d at 630-642. Although the court of appeals determined that the IRFRA did not apply to petitioners' claims by its terms, it also held that, if IRFRA did apply, the City's airport layout plan represented the least restrictive alternative that would further the compelling governmental interests in reducing delay and enhancing capacity at O'Hare. *Id.* at 636.

The court of appeals considered only the claims petitioners raised against state and municipal defendants, and not those against the FAA, because it determined that petitioners' "claims against the [FAA] were resolved in the FAA's favor by the court of appeals for the District of Columbia Circuit" in the prior litigation. *St. John's*, 502 F.3d at 619; see *id.* at 619 n.1.

Petitioners filed a petition for a writ of certiorari, which was denied. See 128 S. Ct. 2431 (2008).

5. The FAA then approved a grant of $29.3 million in federal Airport Improvement Program funds for the modernization project. Pet. App. 62a, 64a. Petitioners filed a petition for review of the grant in the D.C. Circuit, arguing, *inter alia*, that the grant violated RFRA. *Id.* at 65a.

The court of appeals dismissed the petition for review. Pet. App. 62a-68a. The court explained that peti-

tioners failed to demonstrate two essential requirements for standing—that the FAA's grant to the City Chicago caused petitioners' claimed injuries and that a favorable decision from the court of appeals would redress those injuries. *Id.* at 65a-68a. The court determined that petitioners failed to show causation because the "grant reimburses Chicago for completed work that did not affect [them]." *Id.* at 65a. The court also determined that petitioners' claimed injury was not redressable because the FAA "cannot compel Chicago to complete the O'Hare project" and because "Chicago will provide most of the funding and is prepared to obtain funding from other sources if federal money is unavailable." *Id.* at 67a.

The FAA then authorized another grant for the modernization project, and petitioners filed a petition for review of the grant.

The court of appeals also dismissed that petition for review for lack of standing, explaining that petitioners failed to demonstrate causation and redressability. See *St. John's United Church of Christ* v. *FAA*, No. 07-1435 (D.C. Cir. July 14, 2008) (per curiam).

Petitioners did not seek this Court's review of either decision.

6. Petitioners then brought the instant case, which concerns the FAA's approval of certain passenger-facility charges (PFCs). PFCs are ticket charges, collected from airplane passengers by commercial airlines and remitted to an airport owner such as the City of Chicago for use on eligible airport-related projects. See 49 U.S.C. 40117(a)(3)(A), (b)(1) and (4), and (i)(2)(A); 14 C.F.R. 158.41; see also Pet. App. 5a-6a. PFCs are non-federal, local revenue. See Pet. App. 5a; see also, *e.g.*, 14 C.F.R. 158.3, 158.5, 158.13; 56 Fed. Reg. 24,254 (1991) ("PFC revenue is local money."); *Illinois Dep't of*

Transp. v. *Hinson*, 122 F.3d 370, 372 (7th Cir. 1997) ("PFC revenues belong to the agency levying the charges, here the City of Chicago.").

An airport operator must obtain approval from the FAA before imposing PFCs. See 49 U.S.C. 40117(d); 14 C.F.R. 158.5; see also Pet. App. 6a. The FAA is authorized to approve an application to impose PFCs to fund a specific project if it finds that the amount and duration of the PFC is not more than necessary to finance the project; that the application provides adequate justification for the project; and that the project is an eligible airport-related project that will preserve or enhance safety, capacity, or security, reduce noise, or provide an opportunity for enhanced competition between or among air carriers. 49 U.S.C. 40117(d); see Pet. App. 6a.

The City of Chicago sought FAA authorization to impose and use PFCs for four projects that are part of the O'Hare modernization project. Pet. App. 6a. In September 2007, the FAA issued a final agency decision authorizing the City to impose and use those PFCs. *Id.* at 1a. Petitioners filed a petition for review of that decision, arguing that the FAA's approval of certain PFCs violated the RFRA and was arbitrary and capricious.

7. The court of appeals dismissed in part and denied in part the petition for review. Pet. App. 1a-12a.

The court of appeals dismissed the portion of the petition for review that raised a RFRA claim, holding that petitioners failed to establish Article III standing to raise that claim. Pet. App. 2a-4a. Petitioners argued that the FAA's approval of PFCs to partially fund the construction of a runway substantially burdens their exercise of religion because that requires relocating their cemetery contrary to their belief that the remains

of their co-religionists must remain undisturbed. *Id.* at 2a. The court determined that, even if petitioners could show a legally cognizable injury that was caused by the FAA's approval of the PFCs, petitioners failed to demonstrate redressability, because they did not show "that in the absence of PFCs Chicago would leave the cemetery alone." *Id.* at 2a-3a.

The court determined that the City has several alternative sources of funds to draw upon to finish the modernization project in the absence of PFCs. Pet. App. 3a-4a. The court found, for example, that the City could seek funding from its own tax base or issue bonds to pay for the project. *Ibid.* The court rejected petitioners' argument that the City could not raise taxes because it had made a political promise not to do so, because such a promise has "no legal force whatsoever." *Id.* at 3a. And the court rejected petitioners' argument that the City could not issue bonds because the airlines would not approve them, explaining that airline approval is not required for bonds on which principal and interest are payable from airport revenue after the existing airline agreements terminate. *Id.* at 3a-4a. "In fact," the court noted, the City "has already issued hundreds of millions of dollars worth of such bonds" and "[p]resumably it can do so again." *Id.* at 4a.

The court also determined that the City could attempt to renegotiate with the airlines to issue airline-backed bonds if the modernization project was in jeopardy. Pet. App. 4a. The court explained that the prospect of such "renegotiations with the airlines would not create a significant increase in the likelihood that the project would be scuttled altogether rather than merely delayed." *Ibid.* (internal quotation marks omitted). For all of those reasons, the court of appeals concluded that

petitioners "have not shown the requisite substantial probability that any order of ours could redress their injury." *Ibid.* (internal quotation marks omitted).

The court of appeals then dismissed petitioners' arguments that the FAA failed to comply with various statutory and regulatory requirements in authorizing the PFCs. Pet. App. 5a-11a.[2]

8. Petitioners sought rehearing and rehearing en banc of the court of appeals' decision. The court denied rehearing and rehearing en banc, with no judge requesting a vote on the petition. Pet. App. 13a-14a.

ARGUMENT

Petitioners seek review (Pet. 4-6) of the court of appeals' determination that they lack standing to challenge the FAA's approval of certain PFCs because a favorable decision would not redress their claimed injuries. Petitioners' disagreement with the court of appeals' application of settled legal principles to the facts of this case does not warrant this Court's review. The court of appeals' decision is correct, and it does not conflict with the decision of any other court of appeals or of this Court. Moreover, this case would be a poor vehicle to review the question of redressability because petitioners lack standing for other reasons and their RFRA claim fails in any event. Further review therefore is unwarranted.

1. Petitioners argue that "[t]aken together," the court of appeals' denial or dismissal of their claims in four separate cases have "devastating implications for RFRA." Pet. 5-6; see Pet. 4-7, 23-24. But the only ruling that is at issue here is the court of appeals' most recent determination, which is that petitioners lack *stand-*

[2] Petitioners do not renew those arguments before this Court.

ing to challenge the FAA's approval of the City's plan to collect PFCs to fund portions of the modernization project. See Pet. App. 1a-12a. The D.C. Circuit did, in three prior cases, reject other challenges petitioners brought to actions taken by the FAA in the context of the O'Hare modernization project. But petitioners did not seek review of any of those decisions in this Court. Accordingly, the only question presented by the petition is whether the court of appeals correctly held that petitioners lacked standing to challenge the FAA's approval of the PFCs on RFRA grounds. See Pet. 11 (acknowledging that "the subject of this Petition * * * is the Court of Appeals' December 19, 2008 determination").

2. The court of appeals' decision is correct. As the court explained, petitioners were required to demonstrate injury, causation, and redressability to establish standing. Pet. App. 3a. Petitioners' theory was that PFCs were "essential[] * * * to fund the runway project and concomitant destruction of the St. Johannes cemetery" and without the PFCs, the runway project would not proceed. *Ibid.*

To demonstrate redressability, the court of appeals observed, petitioners were required to show that the practical consequence of invalidating the PFCs would be a significant increase in the likelihood that petitioners would obtain relief that directly redresses their claimed injury. Pet. App. 4a (citing *Utah* v. *Evans*, 536 U.S. 452, 464 (2002)). Here, because petitioners' "asserted injury arises from the [federal] government's allegedly unlawful regulation (or lack of regulation) of *someone else*," redressability "hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

After reviewing the evidence in the record, the court of appeals concluded that the City of Chicago likely would proceed with the already-in-progress, multi-billion-dollar modernization project even in the absence of the PFCs. Pet. App. 2a-4a. In particular, the court determined that City of Chicago has numerous sources of funding that do not require federal approval, such as increased taxes and general airport revenue bonds. *Id.* at 3a-4a; see Gov't C.A. Br. 21-22. That is precisely the conclusion the court had already reached twice in prior litigation between these parties, when the court explained that "Chicago will provide most of the funding" for the modernization project, and it "is prepared to obtain funding from other sources if federal money is unavailable." Pet. App. 67a; see also *id.* at 43a-45a. And it reflects the fact that it is the City of Chicago, not the FAA, that designed the project, is implementing the project, and ultimately is responsible for the project. *Id.* at 33a.

Petitioners contend (Pet. 17) that their injury is redressable because "it is highly likely that Chicago would follow the direction of the FAA that is consistent with any relief ordered by a court pertaining to RFRA issues." They are mistaken. There is no reason to believe that a federal court order invalidating the PFCs would cause the City of Chicago to change its plans to accommodate the cemetery. That is because the effect of such an order would be to make one certain source of local funds (PFCs) unavailable for the project, not to invalidate the modernization project or the runway reconfiguration. The City has had approval to proceed with the cemetery relocation for many years, since the FAA approved the airport layout plan, ROD 116-117, the court of appeals upheld that approval against petitioners' chal-

lenges, Pet. App. 15a-61a, and petitioners did not seek further review. Indeed, the City of Chicago has relied on finality of the decisions approving the modernization project and has made significant progress in the runway reconfiguration part of the project.[3]

Moreover, there is no basis to assume that the FAA would "direct" the City to suspend the cemetery relocation if the court of appeals sustained a RFRA challenge to the FAA's approval of PFCs. Because the FAA already has approved the modernization project, the only action it could take would be to withhold approval for PFCs. But, as the court of appeals explained, the City of Chicago would have adequate alternative sources of funds to proceed with the project even in the absence of PFCs. Pet. App. 4a-6a.

Petitioners do not take issue with the court of appeals' determination that the City could raise the necessary funds though tax revenues, and they are flatly wrong to suggest (Pet. 21 n.5) that the City may not is-

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[3] Petitioners are mistaken in asserting (Pet. 17) that, because the City of Chicago modified the airport layout plan to avoid Rest Haven Cemetery in advance of FAA's approval of the ROD, the City now would necessarily alter the approved airport layout plan if PFCs were unavailable. The City determined that it could avoid relocating Rest Haven to make way for cargo areas because the planned location of the cargo areas was not essential to the project. *St. John's*, 502 F.3d at 625-626. But the City came to the opposite conclusion for the cemetery at issue here, because it is located in an area that is essential to the runway reconfiguration. *Id.* at 635-636 ("[G]eography and the needs of the expansion project made it impossible * * * to accommodate the St. Johannes cemetery" in the way that the City was able to accommodate Rest Haven.). And the City has relied on the FAA's approval of the airport layout plan; it has completed three of the four projects for which PFCs were approved on the assumption that the runway at issue will be constructed.

sue bonds without airline backing. See Pet. App. 3a-4a; see also C.A. App. 5422-5452, 5453-5526, 9594-9595 (under current Airport Use Agreement and Terminal Facilities Lease, City may issue—and has issued—revenue bonds for which debt servicing is provided not by the airlines directly but from airport revenues collected after the use agreement expires). In light of those alternative sources of funding, as well as the City's commitment to complete this important multi-year modernization project, the court of appeals correctly held that a decision invalidating the PFCs would not redress petitioners' claimed injury.

3. Petitioners' argument amounts to a disagreement with the court of appeals' application of settled legal principles to the facts of this particular case, which does not warrant this Court's review. The court of appeals did not state any new legal standard for redressability; instead, it applied this Court's settled precedents to these particular facts. Indeed, the legal standard petitioners urge for redressability—that they must show the practical consequence of invalidating the PFCs would be a significant increase in the likelihood that they would obtain relief (Pet. 16-18)—is precisely the same standard utilized by the court of appeals. See Pet. App. 4a (citing *Evans*, 536 U.S. at 464); see also *id.* at 43a (same).

Petitioners do not contend that the decision below conflicts with the decision of any other court of appeals, and their claim (Pet. 17-18) that the decision below conflicts with two decisions of this Court lacks merit. In both *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), and *Utah* v. *Evans*, 536 U.S. 452 (2002), this Court considered whether a State had standing to challenge a counting method used in the census because the State

would obtain additional representation in Congress if the census bureau used its preferred counting method. *Evans*, 536 U.S. at 460-461; *Franklin*, 505 U.S. at 790-791; *id.* at 801-802 (opinion of O'Connor, J.). The particular question in each case was whether the State's claimed injury would be redressable by a decision invalidating the counting method used by the census bureau, in light of the fact that other steps would be required before the State would obtain the additional representation in Congress it sought. *Evans*, 536 U.S. at 463-464; *Franklin*, 505 U.S. at 802-803 (opinion of O'Connor, J.). This Court held in both cases that the States had demonstrated redressability, because it was "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision." *Evans*, 536 U.S. at 464 (quoting *Franklin*, 505 U.S. at 803 (opinion of O'Connor, J.)); see *Franklin*, 505 U.S. at 802-803 (opinion of O'Connor, J.); *id.* at 807 (Stevens, J., concurring in part and concurring in the judgment). The *Evans* Court explained that the Court's invalidation of the counting method used would mean that the Secretary of Commerce would issue a revised census report to the President, the President would transmit it to Congress, and Congress would use that report to determine the number of Representatives to which each State is entitled. *Evans*, 536 U.S. at 460-464. As the Court noted, each of those steps is required by statute, *id.* at 461-462, and the Court reasonably could presume that they would be performed, *id.* at 463-464.

Evans and *Franklin* do not conflict with the decision below. In those cases, executive and congressional officials were presumed to carry out the statutory responsibilities that would result from a court decision invalidat-

ing a decision of the Secretary of Commerce. Here, the only result of invalidation of the PFCs would be that the City cannot raise funds for one runway project that is part of modernization program by assessing those fees on passengers. It does not mean that the City would be precluded from carrying out the modernization project; the City's authority to carry out that project was established long ago. And this is not, as petitioners claim (Pet. 19), a question of whether the City would attempt to "evade an adverse decision" from a federal court. Although a federal court may determine that the City cannot collect PFCs to fund the modernization project, it cannot force the City to abandon its plan to relocate the cemetery, both because RFRA is not applicable to the City, see *City of Boerne* v. *Flores*, 521 U.S. 507, 532-536 (1997), and because the City already has obtained a final judgment allowing it to relocate the cemetery. Petitioners therefore cannot demonstrate that a favorable decision would stop the city from relocating the cemetery.

The court of appeals assessed redressability using the very same standard set out in *Franklin* and *Evans*, demonstrating its fidelity to the legal rules set out in those cases. See Pet. App. 4a (citing *Evans*, 536 U.S. at 464); see also *id.* at 43a (same). The fact that the court of appeals came to a different conclusion on markedly different facts does not demonstrate a conflict with a legal rule announced by this Court.

4. Petitioners' remaining arguments lack merit. Contrary to petitioners' contention (Pet. 23), the court of appeals did not "effectively eviscerate RFRA protection in all cases where the federal government either exercises permit approval authority or provides federal funding assistance for actions by non-federal parties

that injure religion." That is because this case does not address either federal permit approval authority or federal funding. Petitioners lost their challenge regarding federal permit authority in 2006 and declined to seek further review. See Pet. App. 15a-61a. And this case does not address whether federal funding makes a city's actions in modernizing an airport attributable to the federal government, because PFCs are not federal funds. Rather, they are charges collected from passengers by the airlines and held by the airport to finance specific projects. See *id.* at 5a-6a; see also, *e.g.*, 14 C.F.R. 158.3, 158.5, 158.13; 56 Fed. Reg. 24,254 (1991); *Hinson*, 122 F.3d at 372. The fact that the FAA approves collection of PFCs does not somehow federalize what is indisputably an action by the City of Chicago.

There is likewise no merit to petitioners' claim (Pet. 24-26) that the decision below would "eviscerat[e] * * * many important environmental laws." The court below did not address requirements for standing under any environmental laws.[4] Nor did petitioners bring any challenge in the court below to the modernization project based on the environmental laws. And they cite no disagreements in the circuits in environmental cases that would be affected by the court of appeals' application of settled standing principles to the facts of this particular case.

5. This case would present a poor vehicle to review the question presented in any event.

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[4] In particular, the court of appeals did not hold "that there is no Article III jurisdiction for seeking enforcement of federal statutory requirements involving federal funding," Pet. 26, both because the court did not state any such broad rules of law, and because this case does not concern federal funds. See pp. 15, 17-18, *supra*.

Even if petitioners could show redressability, they would lack standing because they cannot demonstrate that the City of Chicago's acquisition and relocation of the cemetery is fairly traceable to the FAA's decision to authorize collection of PFCs. See Gov't C.A. Br. 21. The City obtained approval of the airport layout plan in 2005, and that approval allows it to proceed with the cemetery relocation. Moreover, the four projects for which PFCs were approved will not cause petitioners' claimed injuries, because cemetery relocation was not a part of any of those four projects. See *id.* at 11-12, 21; City C.A. Br. 15; see also C.A. App. 9561-9564 (detailing work that will be done on runway at issue using PFCs, which does not include cemetery relocation).

Even if petitioners had standing, they could not demonstrate that RFRA applies to the FAA's approval of PFCs. As the court of appeals explained in the context of petitioners' challenge to the ROD, petitioners have failed to show that any burden on petitioners' religious exercise caused by the modernization project is attributable to the FAA, rather than to the City of Chicago. Pet. App. 24a-27a. Neither "[m]ere approval of or acquiescence in" the City's plan, *id.* at 31a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)), nor "receipt of public funds," *ibid.*, is sufficient to attribute a local project to the federal government. Here, the FAA's approval of the collection of PFCs (which are not federal funds) is merely a "peripheral role in the City's relocation of [the cemetery] is not sufficient to hold the [FAA] responsible for purposes of RFRA." *Id.* at 33a. The FAA did not design the plan and cannot compel the City to implement some or all of the plan and the City is responsible for funding and implementing the plan. *Ibid.* As the court of appeals recognized, to apply RFRA to

the City's modernization project under these circumstances would permit an unconstitutional end-run around *City of Boerne*. *Id.* at 39a-40a.

Finally, and in any event, even if RFRA applied to the City's project, the PFCs would not be invalidated. As the FAA and the Seventh Circuit both have concluded after careful deliberation, the modernization project is narrowly tailored to further the compelling governmental interests in reducing delays and increasing capacity at one of our Nation's most vital transportation centers. See *St. John's*, 502 F.3d at 634-636; ROD 92-103.[5] Petitioners therefore are extremely unlikely to prevail regardless of how this Court resolves the question presented.

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[5] Moreover, petitioners' RFRA claim likely would be precluded under res judicata and collateral estoppel principles because the courts of appeals already have decided that "the relocation of St. Johannes Cemetery cannot be fairly attributed to the actions of the FAA," Pet. App. 39a-40a, and that the modernization project is narrowly tailored to further the compelling governmental interests underlying the project, *St. John's*, 502 F.3d at 634-636. See Gov't C.A. Br. 22-26; see also *St. John's*, 502 F.3d at 619 & n.1 (observing that petitioners' claims against the FAA previously were resolved in the FAA's favor in the D.C. Circuit).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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